

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CARL MEALING,

Plaintiff,

v.

CITY OF RIDGEFIELD, WASHINGTON;  
RIDGEFIELD POLICE DEPARTMENT;  
RIDGEFIELD POLICE CHIEF BRUCE  
HALL; BRUCE HALL in his individual  
capacity; RIDGEFIELD CITY MANAGER  
GEORGE FOX, and GEORGE FOX in his  
individual capacity,

Defendants.

Case No. C05-5778FDB

ORDER GRANTING DEFENDANT  
FOX'S MOTION TO EXCLUDE  
EXPERT TESTIMONY

Defendant Fox moves to exclude Plaintiff's experts for the reason that such disclosure was required by March 5, 2007, and no disclosures have been made. Plaintiff opposes the motion arguing (1) that Defendant Fox failed to first confer with Plaintiff's new counsel, (2) that healthcare providers are excluded from Rule 26(a)(2)'s disclosure requirements, and (3) that any failure to disclose is harmless to Defendant Fox.

Courts generally allow expert testimony by treating physicians without need for a report, provided that the opinions do not extend beyond treatment. *See, e.g., Rogers v. Detroit Edison Co.*, 328 F. Supp. 2d 687, 690 (E.D. Mich. 2004). Nevertheless, even if a party elects to call a physician

1 to testify solely to the treatment, the party must still, consistent with the court's scheduling order,  
2 disclose that person as someone he or she intends to call as an expert. *See Musser v. Gentiva Health*  
3 *Services*, 356 F.3d 751, 757-58 (7<sup>th</sup> Cir. 2004). "Disclosing a person as a witness and disclosing a  
4 person as an expert witness are two distinct acts." *Id.* The court held that "[f]ormal disclosure of  
5 experts is not pointless. Knowing the identify of the opponent's expert witnesses allows a party to  
6 properly prepare for trial. [The defendant] should not be made to assume that each witness disclosed  
7 by the [plaintiffs] could be an expert witness at trial." *Id.*

8 Plaintiff's opposition is without merit. Plaintiff has been represented by counsel throughout  
9 this litigation. Plaintiff's first counsel, Jay Trumble was allowed to withdraw, but Plaintiff's new  
10 counsel's late appearance in this case does not excuse failure to timely disclose information required  
11 by the Federal Rules and the Court's scheduling order.

12 Fed. R. Civ. P. 37 provides as follows:

13 A party that without substantial justification fails to disclose information required by  
14 Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule  
15 26 (e)(2), is not, unless such failure is harmless permitted to use as evidence at a trial,  
at a hearing, or on a motion any witness or information not so disclosed.

16 Fed. R. Civ. P. 37 was promulgated to be "self-executing" in order to produce a strong inducement  
17 for disclosure. Fed. R. Civ. P. 37, advisory comm. Note (1993). Plaintiff's argument confuses  
18 motions to compel with the instant motion to exclude. *See Yeti by Molly, Ltd. v. Deckers Outdoor*  
19 *Corp.*, 259 F.3d 1101, 1106 (9<sup>th</sup> Cir. 2001)(quoting Fed. R. Civ. P. 37, advisory cmte. Note (1993)).  
20 In *Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo Y Beneficiencia de Puerto Rico*, 248 F.3d  
21 29, 34 (1<sup>st</sup> Cir. 2001), *followed in Yeti by Molly*, 259 F.3d at 1106, the *Ortiz-Lopez* court excluded  
22 expert evidence as a sanction for failure to disclose the information required by Rule 26 (a)(2), and in  
23 doing so, rejected the Plaintiff's argument that there had been no prior order compelling disclosure.  
24 The appellate court ruled that a court order issued under Rule 37 need not be violated before a court  
25 may impose sanctions under (c) and went on to say:

1 What the district court must find under Rule 37(c) is that the offending parties were  
2 not "substantially justified" in failing to disclose information required by Rule 26(a) or  
3 Rule 26(e) and that the failure to disclose was not harmless. This is a "self-executing  
4 sanction for failure to make a disclosure required by Rule 26(a), without need for a  
5 motion under subdivision [37](a)(2)(A).

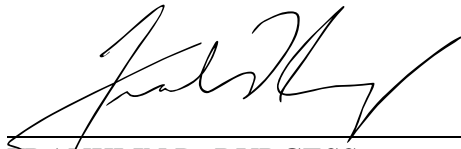
6 *Ortiz-Lopez*, 248 F.3d at 33. The Court in the Ninth Circuit case *Yeti by Molly* ruled similarly:  
7 "Thus, even though [plaintiffs] never violated an explicit court order to produce the [expert] report  
8 and even absent a showing in the record of bad faith or willfulness, exclusion is an appropriate  
9 remedy for failing to fulfill the required disclosure requirements of Rule 26(a)." 259 F.3d at 1106.  
10 Expert testimony was also excluded in *1<sup>st</sup> Source Bank v. First Resource Credit Union*, 167 F.R.D.  
11 61 (N.D. Ind. 1996), a case factually close that at bar.

12 The need to indicate any treating physician that may be called as an expert is necessary for  
13 the Defendant to adequately prepare, and the Defendant will not be made to assume that such  
14 witnesses could be experts. *See Musser, supra*.

15 Plaintiff has failed to demonstrate his failure is harmless, as is the plaintiff's duty. *See Yeti by*  
16 *Molly*, 259 F.3d at 1106. Discovery is to be completed by May 14, 2007, and there is insufficient  
17 time for Defendant Fox to review any disclosure made now to determine what depositions would  
18 need to be taken. This case has been marked by delays, and the Court is not inclined to countenance  
19 any further delay.

20 ACCORDINGLY, IT IS ORDERED: Defendant Fox's Motion To Exclude Plaintiff's  
21 Experts [Dkt. # 100] is GRANTED, and Plaintiff shall not be permitted to offer any expert testimony  
22 at trial and/or in opposition/support of any dispositive motion.

23 DATED this 7<sup>th</sup> day of May, 2007.

24   
25 FRANKLIN D. BURGESS  
26 UNITED STATES DISTRICT JUDGE